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14 UNITED STATES DISTRICT COURT

15 FOR THE CENTRAL DISTRICT OF CALIFORNIA

16 UNITED STATES OF AMERICA,  
17 Plaintiff,  
18 v.  
19 JOHN JACOB OLIVAS,  
20 Defendant.  
21  
22

ED CR No. 18-231-JGB

GOVERNMENT'S OPPOSITION TO  
DEFENDANT'S MOTION IN LIMINE TO  
PRECLUDE GUILT-ASSUMING  
HYPOTHETICALS (DKT. 74)

Hearing Date: November 15, 2021  
Hearing Time: 2:00 P.M.  
Location: Courtroom of the  
Hon. Jesús G. Bernal

23 Plaintiff United States of America, by and through its counsel  
24 of record, the Acting United States Attorney for the Central District  
25 of California and Assistant United States Attorneys Eli A. Alcaraz  
26 and Frances S. Lewis hereby files its opposition to defendant's  
27 motion in limine to preclude guilt-assuming hypotheticals (dkt. 74).  
28

1        This opposition is based upon the attached memorandum of points  
2 and authorities, the files and records in this case, and such further  
3 evidence and argument as the Court may permit.

4        Dated: October 26, 2021

Respectfully submitted,

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9                    /s/

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1 examined about their awareness of specific instances of defendant's  
2 past conduct, including his past arrests and convictions as permitted  
3 under Federal Rule of Evidence 405(a).

4 Further, there is no prohibition on asking guilt-assuming  
5 hypotheticals to expert witnesses. Additionally, the government is  
6 permitted to ask fact witnesses, particularly its victim witnesses,  
7 relevant questions that may have a guilt-assuming element. United  
8 States v. Laurienti, 611 F.3d 530, 549 (9th Cir. 2010) ("With respect  
9 to the government's fact witnesses, however, there appears to be no  
10 support for the proposition that the government cannot ask its own  
11 fact witnesses otherwise relevant questions that may have a guilt-  
12 assuming element." (emphasis in original)).

13 The government therefore opposes defendant's motion to the  
14 extent it tries to stretch the prohibition on asking guilt-assuming  
15 hypotheticals of defense character witnesses beyond what the law  
16 prohibits.

## 17 **II. ARGUMENT<sup>2</sup>**

### 18 **A. The Prohibition on Guilt-Assuming Hypotheticals Applies to** 19 **Defense Character Witnesses Only, and Does Not Prohibit** 20 **Cross-Examining on Specific Acts Under Evidence Rule 405(a)**

21 Concerning character witnesses, the Supreme Court has recognized  
22 that opinion and reputation character evidence -- particularly  
23 cumulative character evidence -- has weak probative value and great  
24 potential to confuse the issues and prejudice the jury. See  
25 Michelson v. United States, 335 U.S. 469, 480, 486 (1948). The Court  
26 has thus given trial courts wide discretion to limit the presentation

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27  
28 <sup>2</sup> The government incorporates by reference the additional  
factual and procedural background set forth in the government's  
motion in limine No. 1 filed on July 19, 2021. (Dkt. 80.)

1 of character evidence. Generally, evidence of a defendant's  
2 character may be proved only by testimony about the person's  
3 reputation or by testimony in the form of an opinion. Fed. R. Evid.  
4 405.

5 On cross-examination of a defendant's character witness, the  
6 government may inquire into specific instances of defendant's past  
7 conduct relevant to the character trait at issue. See Fed. R. Evid.  
8 405(a). In particular, a defendant's character witnesses may be  
9 cross-examined about their knowledge of the defendant's past crimes,  
10 wrongful acts, and arrests. See Michelson, 335 U.S. at 477-79. The  
11 government may also call contradictory witnesses to testify as to  
12 defendant's negative reputation in the community. Id. at 479.

13 The government, however, agrees with defendant that it may not  
14 cross-examine defense character witnesses by asking whether their  
15 opinion would change if defendant had, in fact committed the acts  
16 alleged in the indictment. See Shwayder, 312 F.3d at 1120-21. In  
17 Shwayder, the Ninth Circuit held that asking a defense character  
18 witness guilt-assuming hypotheticals "undermines the presumption of  
19 innocence and thus violates a defendant's right to due process." 312  
20 F.3d at 1121.

21 Consistent with these holdings, the government does not intend  
22 to ask any of defendant's character witnesses whether knowing that  
23 defendant had committed the sexual assaults alleged in the indictment  
24 would change his or her opinion of defendant's character. The  
25 charged sexual assaults consist of (1) defendant's attempted rape of  
26 K.L. in January 2012 (Count 1); (2) defendant's rape of N.B. in  
27 September 2012 (Count 2); and (3) defendant's rape of N.B. in  
28 November 2012 (Count 3).

1       The government does, however, intend to ask any of defendant's  
2 character witnesses, under Rule 405(a), about whether their knowledge  
3 of the following facts might change their opinion of defendant:

- 4       • Defendant's arrest, guilty plea, and conviction for  
5       assault with a gun against his father, in violation of  
6       California Penal Code ("CPC") § 245(a)(2);
- 7       • Defendant's arrest, guilty plea, and conviction for  
8       infliction of corporal injury resulting in a traumatic  
9       condition upon a cohabitant, in violation of CPC  
10      § 273.5(a);
- 11      • Defendant's arrest and guilty plea for witness tampering,  
12      in violation of CPC § 136.1(b)(1);
- 13      • Defendant's arrest for violating the personal liberty of a  
14      spouse or cohabitant, in violation of CPC § 236;
- 15      • Defendant's arrest for sodomy on an unconscious victim, in  
16      violation of CPC § 286; and
- 17      • any of defendant's uncharged sexual assaults or violent  
18      acts that are ultimately admitted<sup>3</sup> at trial, as detailed  
19      in the government's motion in limine to admit evidence of  
20      uncharged conduct (dkt. 80).

21       These questions all become appropriate topics on cross-  
22 examination if defendant introduces character evidence because they  
23 call into question the weight with which the jury should afford an  
24 opinion or reputation formed without due consideration of such  
25 negative acts. Michelson, 335 U.S. at 479 ("The price a defendant  
26

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27       <sup>3</sup> If the Court excludes from the government's case-in-chief any  
28 of the uncharged violent and sexual acts for which defendant was not  
arrested or charged, the government will request a sidebar before  
inquiring with a defense witness about such topics.

1 must pay for attempting to prove his good name is to throw open the  
2 entire subject which the law has kept closed for his benefit and to  
3 make himself vulnerable where the law otherwise shields him."). Such  
4 questioning simply requires "a good faith belief in the misconduct of  
5 the defendant which was the subject of the question." United States  
6 v. Davenport, 753 F.2d 1460, 1463-64 (9th Cir. 1985).

7 The prohibition on asking guilt-assuming hypotheticals has a  
8 narrow scope, so the Court should deny defendant's motion to the  
9 extent it extends the prohibition past questions posed during cross  
10 examination of any defense character witnesses.

11 **B. There Is No Prohibition on Asking Hypotheticals to Experts**  
12 **or Asking Fact Witnesses Questions that May Have Guilt-**  
**Assuming Elements**

13 There is no law prohibiting the government from asking experts  
14 guilt-assuming hypotheticals. Indeed, despite arguing that guilt-  
15 assuming hypotheticals increase unfairness when asked to an expert  
16 (Mot. at 5), every single of defendant's case citations concerns the  
17 use of guilt-assuming hypotheticals for character witnesses, not  
18 expert witnesses (Mot. at 3-5). Defendant has not identified a  
19 single case -- and the government is aware of none -- extending the  
20 holding of Shwayder to expert witnesses, whether called by the  
21 government or the defense.

22 Nor should this Court break new ground in this area. In  
23 reaching its holding in Shwayder, the Ninth Circuit explicitly relied  
24 on the difference in probative value between asking character  
25 witnesses hypotheticals as compared to experts. "Although an  
26 argument can be made that guilt-assuming hypothetical questions may  
27 be probative of the credibility of a non-expert witness, an opinion  
28 elicited by a question that assumes that the defendant is guilty can



1 have only negligible probative value as it bears on the central issue  
 2 of guilt.'" Shwayder, 312 F.3d at 1120 (quoting United States v.  
 3 Mason, 993 F.2d 406, 408-09 (4th Cir. 1993)); see also Laurienti, 611  
 4 F.3d at 549 ("We have held that guilt-assuming hypotheticals are  
 5 impermissible in the context of the government's cross-examination of  
 6 a defendant's character witnesses." (emphasis in original));<sup>4</sup> United  
 7 States v. Henderson, 409 F.3d 1293, 1300 (11th Cir. 2005) ("[T]he  
 8 ability to answer hypothetical questions is the essential difference  
 9 between expert and lay witnesses.") (internal quotation marks and  
 10 citation omitted).<sup>5</sup>

11 The Ninth Circuit has long held that "[e]xperts may be asked  
 12 hypothetical questions on cross-examination" so long as "such  
 13 questions must not require the expert to assume facts that are not in  
 14 evidence." United States v. Stinson, 647 F.3d 1196, 1214 (9th Cir.  
 15 2011). Where a defendant contests the questions asked of a defense  
 16 witness during cross-examination, the issue is whether the government  
 17 had a "good faith basis" to pose the challenged questions. United  
 18 States v. Rushton, 963 F.2d 272, 274-75 (9th Cir. 1992). So long as  
 19 cross-examination questions are supported by a "factual predicate,"  
 20 the district court does not abuse its discretion by permitting them.  
 21 Davenport, 753 F.2d at 1464; see United States v. Tanaka, 707 F.

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24 <sup>4</sup> Laurienti also favorably cites a Third Circuit case  
 25 distinguishing opinion witnesses from reputational witnesses and  
 26 holding that the admission of guilt-assuming hypotheticals is not per  
 27 se error. Laurienti, 611 F.3d at 549. For purposes of this trial,  
 however, the government is not drawing a distinction between  
 reputational and opinion character witnesses and will avoid guilt-  
 assuming hypotheticals about the charged conduct with either type.

28 <sup>5</sup> The Ninth Circuit repeated this distinction in an uncitable  
 opinion in United States v. Latysheva, 162 F. App'x 720, 725 (9th  
 Cir. 2006).

1 App'x 448, 449 (9th Cir. 2017) (no error where cross-examination  
2 questions asked in good faith based on record).

3 Similarly, there is no prohibition on asking fact witnesses  
4 hypotheticals that may have a guilt-assuming element. In Laurienti,  
5 to establish materiality, the government asked victims of defendant's  
6 fraud scheme whether they would have invested had they known certain  
7 representations to be false. Id. at 549-550.

8 Although defendant has not moved to preclude the government's  
9 use of hypotheticals during the direct examination of its fact  
10 witnesses, to the extent that argument is raised for the first time  
11 on reply, the government opposes that as well.<sup>6</sup>

12 **C. The Appropriateness of a Limiting Jury Instruction is**  
13 **Better Considered During Trial**

14 Defendant asks the Court to provide a limiting instruction if  
15 the government is permitted to ask guilt-assuming hypotheticals.  
16 (Mot. at 6.) As discussed, the presentation of any guilt-assuming  
17 hypotheticals is prohibited only as to cross-examination of defense  
18 character witnesses. The government has no intention of violation  
19 this prohibition, so a limiting instruction is unnecessary. At the  
20 very least, any discussion of a limiting instruction as it concerns  
21 any guilt-assuming hypotheticals presented at trial should be tabled  
22 until trial.

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27 <sup>6</sup> For example, in order to establish that defendant was acting  
28 under color of law, the government anticipates asking its fact  
witnesses whether they would have behaved differently had defendant  
not improperly asserted his law enforcement authority.

1 **III. CONCLUSION**

2 For the foregoing reasons, the government respectfully requests  
3 that this Court deny defendant's motion in limine to preclude guilt-  
4 assuming hypotheticals (dkt. 74).